Supreme Court, U.S.
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No. 02-1629

IN THE
Supreme Court of the United States

CLARK COUNTY, NEVADA AND MORGAN HARRIS,

Petitioners,

v.

ROBERTO MIRANDA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit's decision that respondent's complaint states a claim against the petitioners under 42 U.S.C. § 1983 for depriving him of his Sixth Amendment rights under color of law presents any issues that merit review by this Court.

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INTRODUCTION

This is an unusual case. Respondent Roberto Miranda spent fourteen years on death row for a crime he did not commit. In 1996, a Nevada state court granted his petition for post-conviction relief and vacated both his conviction and sentence. App., *infra*, 1a. The court found that he had received ineffective assistance of counsel because the inexperienced assistant public defender who handled his case had conducted virtually no investigation and had therefore failed to uncover strong evidence indicating that Mr. Miranda was innocent and implicating the principal prosecution witness, Fernando Cabrera, as the real killer.

Mr. Miranda later filed this lawsuit under 42 U.S.C. § 1983 against (among others) Clark County, Nevada, and its head Public Defender, Morgan Harris, claiming that they were liable for the violation of his Sixth Amendment rights because the violation was the result of administrative policies promulgated by the Public Defender as the final policymaker for the County on the matters at issue. In the interlocutory ruling that gives rise to this petition, the *en banc* Ninth Circuit held that Mr. Miranda's complaint was sufficient to state a claim under Rule 12(b)(6). *Miranda v. Clark County*, 319 F.3d 465 (9th Cir. 2003) (*en banc*). In particular, the court held that the complaint adequately alleged state action by the Public Defender under *Polk County v. Dodson*, 454 U.S. 312 (1981); that it stated a claim that the violation of Miranda's Sixth Amendment rights was attributable to the Public Defender's policies; and that it sufficiently alleged that the Public Defender was a policymaker for the County whose actions could subject it to liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The court therefore remanded for further proceedings, including discovery on Mr. Miranda's claims.

The petitioners' request that this Court step in at this early stage in the proceedings is fundamentally misguided. Petitioners' assertion that there is a conflict among the

circuits over the state action issue is incorrect, and in the absence of a conflict the issue is merely one of application of *Polk County* to an unusual set of as-yet undeveloped facts. Petitioners' assertion that the case presents an important Sixth Amendment issue rests on a mischaracterization of the Ninth Circuit's ruling on this point. Far from dispensing with basic elements of a Sixth Amendment claim under *Strickland v. Washington*, 466 U.S. 668 (1984), the Ninth Circuit considered only whether Mr. Miranda had adequately alleged a basis for holding these particular defendants liable for a Sixth Amendment violation that had already been established under the *Strickland* standard in Mr. Miranda's post-conviction proceedings. App., *infra*, 1a. Review of that fact-bound determination is unwarranted, especially since the factual record has yet to be developed. Finally, petitioners' assertion that the Public Defender is not a policymaker for Clark County within the meaning of *Monell* is, by petitioners' own admission, a fact-specific issue of *state* law, and, in any event, petitioners' position on that issue rests on a complete misunderstanding of what it means for an official to be a policymaker within the meaning of *Monell* and its progeny. For all these reasons, the petition for certiorari should be denied.

STATEMENT OF THE CASE

In August 1981, Manuel Torres was murdered in Las Vegas, Nevada. Police suspicion at first focused on Fernando Cabrera, whose fingerprints were found in Torres' pickup truck, who had been seen selling Torres' possessions on the street, and who had in his pocket a ring belonging to Torres. Cabrera's brother and sister-in-law also informed the police that Cabrera's lover had told them Cabrera had come home "all bloody" the night of the murder and said he had "killed a Mexican man who worked at the Stardust Hotel" (a description that fit Torres).

Cabrera repeatedly denied that he knew anything about the murder, and even denied knowing Torres, but eventually

told the police that Roberto Miranda had killed Torres. Cabrera singled out Mr. Miranda because he resented Mr. Miranda's relationship with a woman with whom Cabrera had once been intimately involved. Despite Cabrera's motives for implicating someone else and the substantial evidence pointing to him as the killer, Mr. Miranda was arrested and charged with capital murder.

The Clark County Public Defender's Office assigned Thomas Rigsby, an assistant public defender with little more than a year's experience who had never tried a capital case, to defend Mr. Miranda. At Mr. Miranda's first meeting with Rigsby, Rigsby asked him to take a polygraph test, to which he agreed. The test was administered to Mr. Miranda, a Spanish speaker, by an English-speaking examiner, whose interpretation of the results was adverse to Mr. Miranda.

Thereafter, Rigsby did virtually nothing to prepare for Mr. Miranda's trial. Mr. Miranda supplied him with the names of witnesses who would contradict the testimony against Mr. Miranda, would implicate Cabrera in the crime, and would explain Cabrera's motives for trying to pin the crime on Mr. Miranda. Rigsby, however, failed to interview the witnesses and obtain their attendance at Mr. Miranda's trial. The trial court refused Mr. Miranda's requests to replace Rigsby with another lawyer who would represent him more diligently.

Mr. Miranda was tried in August 1982. Cabrera was the principal prosecution witness against him. Because of Rigsby's lack of effort, the many witnesses who would have contradicted and impeached Cabrera's testimony did not testify, and Mr. Miranda was convicted and, after a one-day sentencing hearing, sentenced to death. Over Mr. Miranda's objection, Rigsby continued to represent him on direct appeal, and his conviction and sentence were affirmed.

So began Mr. Miranda's fourteen-year odyssey through the arcane world of capital post-conviction proceedings. Mr. Miranda's initial efforts to obtain state post-conviction relief

proved unsuccessful after bouncing up and down through the Nevada courts for six years. His first (and only) federal habeas petition was then dismissed without prejudice to allow exhaustion of certain claims. In May 1994, Mr. Miranda filed a petition for habeas corpus in the state trial court raising, among other things, the claim that Rigsby's failure to investigate the case and to discover and procure the attendance of defense witnesses constituted ineffective assistance of counsel in violation of the Sixth Amendment.

The court held an evidentiary hearing on July 13, 1995. Based on testimony presented at that hearing as well as on uncontradicted declarations submitted on behalf of Mr. Miranda, the court concluded that Rigsby had failed to investigate the case adequately, had not located reasonably available defense witnesses, and as a result had not presented at trial testimony and other evidence that would, "in reasonable probability, have effected [*sic*] the outcome of the trial." App., *infra*, 4a. The court found that "[t]he lack of pre-trial investigation and preparation by trial counsel, as is set forth in the petition for writ of habeas corpus and unchallenged by the state, cannot be justified." *Id.* at 5a. The court observed as well that it appeared "that there are many additional grounds upon which relief would be warranted," but that "[t]he failure of trial counsel to effectively investigate and prepare this case for trial is so glaring and clear that this Court finds there is no need to proceed beyond the issue of the violation of the Sixth Amendment guarantee of effective assistance of counsel in order to decide the merits of the petition and grant relief." *Id.*

The State of Nevada declined to retry Mr. Miranda.

In August 1998, Mr. Miranda filed this lawsuit under 42 U.S.C. § 1983 in the United States District Court for the District of Nevada against petitioners Clark County and its Public Defender, Morgan Harris, as well as against Rigsby and certain others. The complaint alleges, among other things, that Rigsby performed an inadequate investigation

and provided a substandard defense, and that Mr. Miranda suffered prejudice as a result, in violation of the Sixth Amendment. In addition to seeking recovery from Rigsby for his direct role in this violation, the complaint alleges that the Public Defender is liable for the violation because it resulted from his policies of allocating resources to cases based on polygraph results and assigning inexperienced attorneys to capital cases. The complaint further alleges that the County is liable because the Public Defender was acting as the policymaker for Clark County.

The District Court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) as to Rigsby, the Public Defender, and the County under a heightened pleading standard (which this Court has repeatedly held inapplicable to civil rights complaints, *see Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993); *see also Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002)). As to Rigsby, the court held that the complaint failed to allege that he acted under color of state law within the meaning of *Polk County*. As to the Public Defender and the County, the court held that the complaint did not allege a sufficient basis for attributing the Sixth Amendment violation to them.

Because the dismissal did not dispose of claims against certain other defendants, Mr. Miranda obtained a Rule 54(b) order and appealed. A panel of the Ninth Circuit affirmed, but the court granted Mr. Miranda's petition for rehearing *en banc* and vacated the panel opinion. The *en banc* court then affirmed the dismissal as to Rigsby under *Polk County*, but found that the complaint stated a cause of action against both the Public Defender and the County under the liberal pleading standard applicable to civil rights complaints.

The court observed that while *Polk County* precludes a finding that a public defender is a state actor when acting as counsel on behalf of a defendant, the decision permits a finding of state action when a public defender is engaged in

"administrative and possibly investigative functions." 319 F.3d at 469 (quoting *Polk County*, 454 U.S. at 325). Emphasizing that "[k]ey to our review is the stricture that when reviewing a dismissal of a complaint under Rule 12(b)(6), all allegations are to be considered in a light most favorable to the plaintiff," *id.*, the court held that Mr. Miranda had alleged that the Public Defender was engaged in an administrative function when he promulgated the polygraph and attorney assignment policies on which the complaint premised its claims of liability.

The court also held that the complaint sufficiently alleged that those policies resulted in the Sixth Amendment violation Mr. Miranda had suffered and constituted deliberate indifference to his constitutional rights within the meaning of *Canton v. Harris*, 489 U.S. 378 (1989). *See* 319 F.3d at 470-71. Moreover, as to the County, the Ninth Circuit held that the complaint adequately stated a claim for municipal liability under *Monell*, 436 U.S. at 690-91, by alleging that in promulgating the challenged policies, the Public Defender was acting "as a policymaker on behalf of Clark County." 319 F.3d at 470.

Accordingly, the court reversed the judgment in favor of the Public Defender and the County and remanded to the district court for further proceedings.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S APPLICATION OF *POLK COUNTY V. DODSON* DOES NOT WARRANT REVIEW.

The Ninth Circuit's holding in this case represents a straightforward application of the holding in *Polk County* — that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding" but may be a state actor "while performing certain administrative ... functions" — to the particular allegations of the complaint in this case.

Polk County, 454 U.S. at 325. The Ninth Circuit faithfully cited the principles of *Polk County*. *See* 319 F.3d at 466-67. Consistent with this Court's emphasis in *Polk County* that "we do not suggest that a public defender never acts" under color of law, 454 U.S. at 324-25, the Ninth Circuit carefully considered the allegations of Mr. Miranda's complaint and concluded that it stated a claim that the Clark County Public Defender's performance of the administrative function of formulating policies governing the allocation of his office's resources gave rise to the violation of Mr. Miranda's Sixth Amendment rights. Whether those policies in fact existed, and whether they in fact caused the deprivation of Mr. Miranda's rights, are matters yet to be determined.

Under this Court's Rule 10, the Ninth Circuit's application of the "properly stated rule of law" of *Polk County* to the particular allegations of Mr. Miranda's complaint is not a question worthy of a grant of certiorari. Petitioners' contrary claim that this fact-bound and interlocutory ruling merits review by this Court rests principally on the contention that it conflicts with holdings of the Eighth and Tenth Circuits. Review of the decisions petitioners cite, however, reveals that the "conflict" is illusory.

Petitioners rely primarily on the Eighth Circuit's decision in *Eling v. Jones*, 797 F.2d 697 (8th Cir. 1986). There, the court held, on appeal from a district court's summary judgment ruling, that public defenders had not acted under color of state law when they refused to provide copies of transcripts to their indigent clients in particular cases. In that case, however, the court explicitly found, on the factual record developed in the case, that in denying the transcripts in particular cases, the public defender "was dealing with appellants as clients," and that "[t]he uncontroverted evidence clearly shows that the Public Defender exercised a certain amount of discretion and used professional judgment in deciding not to order copies of the transcripts" in the cases

at issue. 797 F.2d at 699. Although the court did offhandedly use the word "policy" once in its opinion when discussing another issue (*see id.*), it did not, as the petitioners misleadingly imply (Pet. at 10), frame the issue as a challenge to a policy of the public defender's office. Indeed, the court's discussion of *Polk County* included no consideration of whether there was an administrative "policy" that supplied the element of state action.[1]

Petitioners' reliance on the Tenth Circuit's unpublished disposition in *Brown v. Langdon*, 5 F.3d 545 (Table), 1993 WL 372685 (10th Cir. Sept. 24, 1993), is an even weaker reed on which to rest their claim that this case merits review. Under Tenth Circuit Rule 36.3, "[u]npublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel." Because the court's disposition in *Brown* does not necessarily indicate how the Tenth Circuit would decide even an identical case in the future, let alone provide principles that would determine its rulings in cases presenting factual differences, it cannot establish a conflict among the circuits on the question in this case.

Moreover, the unpublished order and judgment in *Brown*, even if it were regarded as a precedent in some sense, hardly could be said to conflict with the Ninth Circuit's decision in this case. *Brown* involved the alleged denial of a transcript to a single prisoner, and the only "holding" in the court's memorandum was that "the refusal of a state public defender to furnish a copy of a trial transcript to an indigent prisoner represented by a public defender does not state a claim under 1983." 1993 WL 372685, at *2. The court's memorandum did not address whether state action could be found on the basis of a public defender's administrative policies, nor does

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[1] The court's only reference to a "policy" came in dicta in which the court suggested that the office "revie[w] and reconside[r]" its policy. 797 F.2d at 699.

it even appear that the complaint filed by the inmate in that case had properly alleged the existence of such a policy.[2]

In sum, neither of the two cases on which petitioners rely for their assertion of a conflict addresses whether a public defender may be found to have acted under color of state law in promulgating an administrative policy governing the operation of his office — let alone an administrative policy concerning the allocation of office resources to the defense of cases, which is the specific issue here. And beyond *Eling* and *Brown*, petitioners identify no other lower court cases that even come close to addressing the *Polk County* "under color of law" issue presented by this case.

The paucity of relevant cases cited by petitioners is ironic given their assertion that the issue presented is "important and recurring" (Pet. at 11). In the more than twenty years since *Polk County* was decided, petitioners can point to only three federal appellate decisions (including this case) that present even vaguely similar issues. The most recent case they cite (other than the opinion below) is the decade-old unpublished disposition in *Brown*. And the Ninth Circuit's opinion in this case appears to be the *only* federal appellate opinion since *Polk County* that considers whether a public defender acted under color of state law in promulgating administrative policies that govern the allocation of his office's resources and that have allegedly resulted in the deprivation of a defendant's Sixth Amendment right to

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[2] The only mention of the word "policy" in the court's memorandum comes in its description of the points raised by the inmate on appeal, which included that "the policy of the Wyoming Public Defenders in the handling of indigent criminal defendant's documents is violative of the Fourteenth Amendment." 1993 WL 372685, at *1. The court's memorandum, however, does not go on to address any alleged "policy," apparently because the inmate's allegations "show[ed] the estranged correspondence between the public defenders office and its former client, and no more." *Id.* at *2 n.3.

effective assistance of counsel. That is hardly the hallmark of a recurring issue.

Finally, even if the Court were interested in addressing whether and under what circumstances the issuance of administrative policies by a head public defender constitutes state action for purposes of § 1983, the interlocutory posture of this case would make it a poor choice as a vehicle for deciding such issues. Because the case was appealed from a Rule 12(b)(6) dismissal, there is as yet no factual record — let alone any factual determination — about the existence or nature of the Public Defender's policies or their relationship to the violation of Mr. Miranda's Sixth Amendment rights. Proceedings on remand could yet obviate the need to address the *Polk County* issue altogether if Mr. Miranda does not succeed in proving his case. More importantly, even positing (as we do) that Mr. Miranda will be able to prove the allegations of his complaint, a factual record disclosing exactly what the policies were, and how they were promulgated and applied in the circumstances of this case, would contribute to a more informed decision on the application of the principles of *Polk County* in a concrete factual setting. This case is, therefore, an obvious candidate for application of this Court's normal practice of not granting certiorari to review an interlocutory ruling of a federal court of appeals. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002). Without more development in the court below, the Ninth Circuit's ruling in this case is still too preliminary for review "given the interlocutory posture of the case." *Nike, Inc. v. Kasky*, 539 U.S. ___, ___ (2003).

II. PETITIONERS' SIXTH AMENDMENT ARGUMENT IS MERITLESS.

Petitioners argue at length that the Ninth Circuit erred in failing to evaluate Mr. Miranda's ineffective assistance of counsel claims under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Indeed, petitioners go so

far as to claim that the Ninth Circuit dispensed completely with *Strickland*'s holding that proof of a Sixth Amendment violation requires a showing that counsel's performance fell "outside the wide range of professionally competent assistance," *id.* at 688, and that "counsel's deficient performance actually prejudiced the defense." Pet. at 17 (citing *Strickland*, 466 U.S. at 687). According to petitioners, the Ninth Circuit cast these requirements to the winds and instead held that the polygraph and case assignment policies of the Clark County Public Defender were "*per se* violations of the Sixth Amendment." Pet. at 19.

Petitioners' assertion that the Ninth Circuit held that these policies "automatically violate the Sixth Amendment" (Pet. at 19) without regard to *Strickland*'s requirements of deficient performance and prejudice is obviously incorrect. Of course, *Strickland* requires a showing of both deficient performance and resulting prejudice. *See, e.g., Wiggins v. Smith*, 539 U.S. __, __ (2003). The reason the Ninth Circuit did not discuss the *Strickland* standard was not that it was unaware of *Strickland*,[3] but that the existence of a Sixth Amendment violation under *Strickland* was not the issue before it. Indeed, it had already been established that Mr. Miranda's Sixth Amendment rights were violated under the *Strickland* standard. A Nevada court so held when it granted him post-conviction relief in an order that made crystal clear that both parts of the *Strickland* standard were satisfied:

> The failure of trial counsel to investigate and present available witness testimony, much of which had been identified to trial counsel by petitioner prior to trial, violated petitioner's rights to due process and effective

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[3] The Ninth Circuit regularly follows *Strickland*, and its precedents show that it knows that a Sixth Amendment ineffectiveness claim requires satisfaction of *Strickland*'s two-part test. *See, e.g., United States v. Tekle*, 329 F.3d 1108, 1113 (9th Cir. 2003); *United States v. Leonti*, 326 F.3d 1111, 1120-21 (9th Cir. 2003); *McClure v. Thompson*, 323 F.3d 1233, 1241 (9th Cir. 2003).

> assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. Petitioner has demonstrated in these proceedings that his trial counsel's performance fell below any reasonable objective standard of constitutionally adequate representation. Based upon this Court's consideration of the evidence that has been adduced by petitioner in these proceedings, the Court concludes that the verdict returned by the jury is unreliable. *Strickland v. Washington*, 466 U.S. 668 (1984); *Sanborn v. State*, 107 Nev. 388, 812 P.2d 1279 (1991).

App., *infra*, 6a.

Thus, the issue before the Ninth Circuit was not whether Mr. Miranda had alleged a Sixth Amendment violation under *Strickland* — no one could possibly doubt that he had — but rather whether he had alleged a basis for holding petitioners liable for that violation. As the Ninth Circuit correctly understood (but petitioners apparently do not) that question turned not on whether the challenged policies were "*per se* violations" of the Sixth Amendment, but on "whether the alleged polic[ies] *resulted in* deprivation of the plaintiff's constitutional rights to effective representation of counsel." 319 F.3d at 470 (emphasis added). In short, the Ninth Circuit did not hold that the policies themselves constituted ineffective assistance of counsel, but only that Mr. Miranda had adequately alleged that the policies reflected deliberate indifference to the right of defendants to effective assistance of counsel and that they had resulted, in his case, in a deprivation of that constitutional right (a deprivation whose existence had already been confirmed by his successful post-conviction review efforts). *Id.* at 470-71.

The Ninth Circuit's analysis applied settled principles to the particular allegations of this complaint. *Canton v. Harris*, 489 U.S. 378 (1989), is instructive on this issue. In *Canton*, this Court held that cities can be held liable under § 1983 for a policy of inadequately training their employees "where the

failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact" and a constitutional violation results. *Id.* at 388. The Court expressly "reject[ed] [the] contention that only unconstitutional policies are actionable under the statute." *Id.* at 387. Rather, the issue is whether the policy "*itself* causes the constitutional violation at issue." *Id.* at 385 (emphasis in original). Consistent with this principle, the Ninth Circuit held in this case only that Mr. Miranda had adequately alleged a policy that amounted to deliberate indifference and that caused the Sixth Amendment violation he unquestionably suffered.

Beyond their mischaracterization of the Ninth Circuit's decision as an assault on *Strickland*, petitioners offer no other good reasons for review of the Sixth Amendment issue by this Court. They allege no conflict among the lower federal courts over whether similar policies reflect deliberate indifference to Sixth Amendment rights sufficient to satisfy the *Canton* standard, for the simple reason that there are no other cases addressing this fact-specific issue. Instead, they argue only that the Ninth Circuit's ruling is "mistaken" (Pet. at 20) and is "predicated on an implausible reading of the complaint." (Pet. at 19.) Neither assertion is correct, but more importantly, this Court does not ordinarily sit to rectify "mistakes," far less to correct courts of appeals on their "reading" of complaints.

Moreover, petitioners' grave warning that "the *en banc* opinion will provide the basis for a flood of ineffective-assistance claims arising from policies of public defender services" is implausible at best. Pet. at 20. As even the Ninth Circuit is aware (though petitioners apparently are not), to file a § 1983 claim premised on ineffective assistance of counsel, a prisoner would first have to obtain appellate or post-conviction relief on that basis, because "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or

sentence has been invalidated." *Heck v. Humphrey*, 512 U.S. 477, 489-90 (1994); *see also Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995) (applying *Heck* to lawsuit claiming ineffective assistance of counsel); *Boyd v. Biggers*, 31 F.3d 279, 283 (5th Cir. 1994) (same). Thus, the pool of possible plaintiffs would be limited to the very small number of prisoners who receive habeas relief based on ineffective assistance of counsel by a public defender. Given that only 351 capital defendants were granted state post-conviction relief between 1973 and 2000, it is hardly likely that "countless" cases will result. *See* James S. Liebman *et al.*, *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, Appendix C (2002) (available at www2.law.columbia.edu/brokensystem2/appendix.html).

In any event, the interlocutory posture of the case cuts against review of the Sixth Amendment issue as well. Whether petitioners' policies rendered them responsible under the *Canton* standard for the violation of Mr. Miranda's constitutional rights is an issue that would be best answered on a factual record that made clear exactly what those policies were and what causal relationship they had to the ineffective assistance of counsel that Mr. Miranda received.

III. PETITIONERS' MUNICIPAL LIABILITY ARGUMENTS REFLECT A BASIC MISUNDERSTANDING OF *MONELL* AND PRESENT NO ISSUE MERITING THIS COURT'S REVIEW.

As this Court held in *Pembaur v. Cincinnati*, "where action is directed by those who establish governmental policy, the municipality is equally responsible." 475 U.S. 469, 481 (1986). The Ninth Circuit's holding that Mr. Miranda stated a claim against Clark County reflected only the court's determination that he properly alleged that the Public Defender had decisionmaking authority for the County with respect to the policies that allegedly caused the

violation of Mr. Miranda's constitutional rights. Whether the Public Defender's acts "may fairly be said to represent official policy" of the County, *Monell*, 436 U.S. at 694, is nothing more than a fact-bound question involving application of principles settled by a long string of this Court's decisions, including *Monell*, *Pembaur*, *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), *Canton*, *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997), and *McMillian v. Monroe County*, 520 U.S. 781 (1997). Again, this Court's Rule 10 provides that such a decision is not ordinarily a candidate for review on certiorari.

The accuracy of the Ninth Circuit's fact-specific ruling as to Clark County in particular is validated by a recent study of the Clark County Public Defender's Office. "In March, 2002, Clark County issued a Request for Proposal (RFP) to evaluate current practices and recommend alternatives for improving the efficient use of attorney and staff in the Clark County Public Defender Office (CCPDO)." The National Legal Aid & Defender Association, *Evaluation of the Public Defender Office: Clark County, Nevada, March 2003*, www.nlada.org/Defender/Defender_Evaluation, Executive Summary at i. In this recently released, comprehensive evaluation, the authors noted "the community's number one charge against the office: namely that the CCPDO's obligation to the courts *and the County* historically has superceded the organization's commitment to its clients." *Id.* at 20 (emphasis added). The evaluation also found that "the history of the CCPDO includes significant community dissatisfaction with the manner in which the office has been providing constitutionally mandated services." *Id.* at 67. The evaluation repeatedly referenced the complete lack of training given to public defenders and the strong need for initial and ongoing training. *Id.* at 12, 14-19, 57-59, 100. Petitioners understandably avoid any mention of the existence of this evaluation, which confirms that the Public

Defender's acts "may fairly be said to represent official policy" of the County. *Monell*, 436 U.S. at 694.

In any event, petitioners do not allege that there is a conflict among the circuits over whether the head of a public defender's office is a policymaker for the municipality he serves, nor, indeed, do they identify any other lower court decision that even addresses that issue.[4] Instead, petitioners argue at great length that the Ninth Circuit's decision conflicts with *Monell* and its progeny because the Public Defender acts independently, and not under the control of the Board of Commissioners of Clark County, in developing and implementing the policies of his office.

Petitioners' argument, however, rests on a fundamental misunderstanding of *Monell*. Indeed, it turns the entire *Monell* line of cases on its head. Under this Court's decisions, an official's actions may subject the municipality he serves to liability under § 1983 *only* if he has "*final* policymaking authority" for the "particular area" or

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[4] In a footnote, petitioners halfheartedly claim that the Ninth Circuit's decision conflicts in principle with decisions of the Fourth Circuit, namely *Grayson v. Peed*, 195 F.3d 692, 697-98 (4th Cir. 1999), and *Knight v. Vernon*, 214 F.3d 544, 552 (4th Cir. 2000). In *Grayson*, however, the Fourth Circuit held that the county being sued was not liable principally because "there are no underlying constitutional violations by any individual." 195 F.3d at 697. In addition, the court held that under Virginia state law, the sheriff acted exclusively for the state in operating the jail where the alleged violation took place. *Id.* Here, there is no doubt that Miranda's constitutional rights were violated or that the County Public Defender acts on behalf of the county. As for *Knight*, in that case a former jailer sued the sheriff and county for improper termination. The Fourth Circuit held that the county was not liable for her termination, but did so based on a specific provision of North Carolina law vesting the sheriff with "the exclusive right" to make personnel decisions. 214 F.3d 544, 552 (quoting N.C. Gen. Stat. 153A-103). The Fourth Circuit's analysis in *Knight* is highly questionable under *Pembaur*, *Praprotnik*, and *McMillian*, but its application of *Monell* principles to the particular statutory scheme applicable to North Carolina sheriffs hardly conflicts with the Ninth Circuit's ruling in this case.

"particular issue" involved in the case. *E.g.*, *McMillian*, 520 U.S. at 785 (emphasis added). Thus, the fact that the Public Defender acts independently of the Board of Commissioners and has the final say in developing the policies of his office does not *immunize* the county from liability for his actions. Rather, it is what *makes* the county liable for his actions. Petitioners admit that "there is no dispute that petitioner Harris, the Chief Public Defender, has made final decisions for the Public Defender's Office." Pet. at 24 n.11. Indeed, as the Court explained in *Praprotnik*, if the Commissioners controlled the Public Defender's creation of policies for his office, they and not the Public Defender would be the final policymakers:

> [A]s the *Pembaur* plurality recognized, the authority to make municipal policy is necessarily the authority to make *final* policy. 475 U.S., at 481-484. When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies.

Praprotnik, 485 U.S. at 127 (emphasis added). Thus, far from being inconsistent with the independent decisionmaking authority of the Public Defender (Pet. at 28-30), the Ninth Circuit's recognition that he is the policymaker for the county on the matters at issue is, under this Court's decisions, quite correctly *premised* on that authority.

To be sure, municipal liability requires not only that the policymaker have final authority, but that he have final authority *for the municipality* — as opposed to, for example, the state. *McMillian*, 520 U.S. at 785-86. As petitioners observe, what entity a particular decisionmaker serves is a matter of state law. *See id.* at 786. Petitioners' suggestion that

this Court should review the correctness of the Ninth Circuit's determination that the Public Defender is a policymaker for the County under Nevada law, however, is wholly unwarranted.

To begin with, petitioners' argument runs head-on into the established rule that an asserted error in the application of state law by a federal court of appeals is not a matter that warrants this Court's review. *See Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); Sup. Ct. R. 10. In any event, contrary to petitioners' assertion that the Ninth Circuit "ignored" state law (Pet. at 25), the Ninth Circuit expressly acknowledged the role of state law, citing the very statutes regarding the establishment of public defenders' offices that petitioners claim it ignored. *See* 319 F.3d at 469 (citing Nev. Rev. Stat. chs. 180.090, 260.010, -.040, -.070, -.075).

Indeed, if anyone has ignored the relevant provisions of state law, it is the petitioners, who overlook that Nevada state law provides that the office of public defender is created by ordinance of the boards of county commissioners, Nev. Rev. Stat. § 260.010(1), that the position "must be filled by appointment by the board of county commissioners," *id.* § 260.010(5), and, critically, that "[t]he public defender serves at the pleasure of the board of county commissioners," *id.* § 260.010(6). Moreover, a public defender's compensation is determined by the board of county commissioners, *id.* § 260.040(1), his office is funded by the board of county commissioners, *id.* § 260.040(5), his deputies (at least in a county as large as Clark County) are "governed by the merit personnel system of the county," *id.* § 260.040(6), and he reports to the board of county commissioners, *id.* § 260.070.

In sum, state law makes clear that the public defender is an officer of the county, and although state law also guarantees that he has independent decisionmaking authority for the county in matters affecting his office, that authority is precisely what makes him a policymaker whose actions may impose liability on the county under this Court's decisions.

This case is thus wholly unlike *McMillian v. Monroe County* and *Turquitt v. Jefferson County*, 137 F.3d 1285 (11th Cir. 1998), which petitioners discuss at length. In those cases, this Court and the Eleventh Circuit held that Alabama sheriffs, though policymakers, are not *county* policymakers but state officers. The decisions in both cases turned on specific and unique provisions of the Alabama Constitution that not only provide for the establishment of sheriff's offices, but also "clearly denominat[e] the sheriff as a member of the state's executive department." *Turquitt*, 137 F.3d at 1288 (citing Ala. Const. of 1901, Art. V, § 112). The legislative history of the Alabama Constitution and the Alabama Supreme Court's rulings also "reflect[] an intent to bring sheriffs under the control of superior state officials." *Id.*, 137 F.3d at 1288; *see also McMillian*, 520 U.S. at 789. Absent the exceptional state laws that were decisive in *McMillian* and *Turquitt*, this Court has recognized that county sheriffs are policymakers for their counties when they exercise final decisionmaking authority for a particular area within their control. *E.g., Pembaur*, 475 U.S. at 483 n.12.

Petitioners point to no comparable provisions of Nevada law reflecting a similar intent to make county public defenders officers of the state rather than the county. Indeed, the statutory provisions cited above demonstrate that Nevada public defenders are wholly unlike Alabama sheriffs in this respect. At most, petitioners demonstrate only that Nevada public defenders have a large degree of decisionmaking autonomy in operating their offices. That may be so, but, once again, that only demonstrates that the public defenders are final decisionmakers for their counties with respect to those matters, not that they are somehow separate from the counties whom they serve.

In the end, the only support petitioners offer for their argument that the public defender is "functionally independent" from the county is language describing the functions and loyalties of individual public defenders. *See*

Sanchez v. Murphy, 385 F. Supp. 1362, 1365 (D. Nev. 1974). Petitioners also cite language from other courts to show that "Nevada is not unusual in insulating public defenders from county control." Pet. at 27 n.14.[5] The language offered by petitioners, however, refers to the individual loyalties of individual public defenders, not to the chief public defenders who have "final authority to establish municipal policy with respect to the action ordered." *Pembaur*, 475 U.S. at 481.

CONCLUSION

Despite petitioners' best efforts, no issue worthy of this Court's review can be teased out of this unusual case. The Ninth Circuit's holding that Mr. Miranda's complaint adequately alleges state action follows this Court's analysis in *Polk County*, does not conflict with the decision of any other court of appeals, and is in any event interlocutory in nature. Petitioners' Sixth Amendment argument reflects a basic misunderstanding of the Ninth Circuit's holding, which in no way departed from *Strickland*, and their municipal liability arguments show an equally fundamental misunderstanding of *Monell* and its progeny.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[5] Even the cases offered by petitioners recognize that different levels of accountability apply to public defenders who serve as the heads of offices and deputy public defenders who represent individual clients. In *Sanchez*, the district court emphasized that, although courts appoint "the public defender" to represent defendants, "[t]he public defender appoints deputies and assigns a case to a deputy." 385 F. Supp. at 1365. When the district court discusses the "personal attorney-client relationship" it refers to the relationship "between a *deputy* and a defendant" — not between the defendant and the head of the office. *See also, e.g.*, *Reese v. Danforth*, 406 A.2d 735, 738 (Pa. 1979) (emphasizing that, for deputy public defenders, the "public or state function ceases" after appointment, thus highlighting the difference between county public defenders and their deputies).

Respectfully submitted,

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Date: July 8, 2003

APPENDIX

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA	)	
	)	
Plaintiff,	)	
	)	**Case No. C057788**
vs.	)	**Dept. No. XI**
	)	**Docket No. "S"**
ROBERTO HERNANDEZ, MIRANDA,	)	
	)	
	)	
Defendant.	)	
	)	

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding stems from a judgment of conviction and sentence of death for the crime of first degree murder which was imposed upon the petitioner on August 28, 1992. Petitioner has filed a petition for writ of habeas corpus in this court, challenging the constitutionality of his conviction and sentence on several grounds.

The trial judge, the Honorable Addeliar D. Guy, conducted evidentiary hearings in this matter. However, due to ill health and retirement, Judge Guy was unable to finalize any decision in this case. The undersigned was assigned by the Nevada Supreme Court to hear and determine all matters in this department which Judge Guy was unable to hear and decide. The undersigned has reviewed the documents filed by the parties in this action, as well as the file in this case, prior decisions of the Nevada Supreme Court, transcripts of the evidentiary hearing and arguments of counsel.

This Court notes that this case began in 1981, and the petition for writ of habeas corpus was filed in May of 1994. This matter has been pending since that time. NRS 34.820(7)

requires a court that considers a petition filed by a petitioner who has been sentenced to death to "make all reasonable efforts to expedite the matter and shall render a decision within 60 days after submission of the matter for decision".

Based upon the entire record in this case, this Court finds that the conviction and sentence of petitioner is unconstitutional. Accordingly, this court grants the relief requested by petitioner, and orders that a new trial be held.

FINDINGS OF FACT

1. On April 27, 1982 Roberto Miranda was arraigned in this Court. He was represented by Thomas Rigsby, of the Clark County Public Defender's office. Prior to trial, Mr. Miranda requested the appointment of another lawyer, and complained to the Court that Mr. Rigsby had not attempted to locate witnesses whom he had identified as being valuable to his defense. Mr. Miranda's motion to discharge counsel was denied, and the case proceeded to trial.

2. At the conclusion of trial, Mr. Miranda was convicted of first degree murder, robbery with he use of a deadly weapon and grand larceny. He was sentenced to death by the jury. Sentence was imposed by the trial judge on September 9, 1982.

3. An appeal was taken from the judgment of conviction and sentence. Mr. Rigsby represented petitioner on direct appeal, in spite of Mr. Miranda's continuing objection to Mr. Rigsby's representation.

4. The Nevada Supreme Court affirmed the conviction and sentence. *Miranda v. State*, 101 Nev. 562, 707 P.2d 1121 (1985).

5. On November 25, 1985, petitioner appeared in court for reimposition of the death penalty. Mr. Miranda was advised by both Mr. Rigsby and the deputy district attorney that he had four petitions for post-conviction relief available to him in state court in addition to procedures available in the federal system. The court appointed Mark Bailus, Esq. to

represent petitioner in post-conviction proceedings on December 10, 1985. Evidentiary hearings were conducted on before the trial court. Determinations by the trial judge denying post-conviction relief were twice appealed to the Nevada Supreme Court. Ultimately, the Supreme Court dismissed petitioner's appeal on February 1, 1991.

6. Thereafter, petitioner filed a petition for writ of habeas corpus in the United States District Court for the District of Nevada. Laura FitzSimmons was appointed to represent petitioner in those proceedings. The United States District Judge ultimately dismissed the federal petition to afford petitioner an opportunity to present issues to the state court which had not been adjudicated in the previous state proceedings.

7. In May of 1994, this petition for writ of habeas corpus was filed. Also filed with the petition was an appendix which contained several declarations and other documents. In early September, 1994, the state filed a motion to dismiss the petition alleging that petitioner had waived his right to challenge his conviction and sentence. On November 15, 1994 counsel for petitioner filed an opposition to the state's motion to dismiss, and requested the court defer ruling on the motion to dismiss until the evidentiary hearing was held on the petition. An evidentiary hearing was then set for March 13, 1995. On February 21, 1995, counsel for petitioner appeared in court and informed the court that the case had been reassigned within the district attorney's office. Subsequently, on February 23, 1995, the matter was continued at the state's request so that the newly-assigned deputy district attorney could be present. On March 2, 1995, counsel appeared and the Court reaffirmed the date of March 13, 1995 for the evidentiary hearing. On March 13, 1995, the court continued the matter until April 6, 1995. Due to the ill health of Judge Guy, the matter was reset until July 13, 1995.

8. On July 13, 1995, an evidentiary hearing was held. At that hearing, Belkis Ibarra Cumerma was called and testified.

9. The court, having read the transcribed testimony of that witness finds that her testimony impeached the testimony of the state's key witness, Fernando Cabrera, and that her testimony, had it been presented to the jury, would have impeached the credibility of Fernando Cabrera. Ms. Cumerma testified that Fernando Cabrera had threatened to cause harm to petitioner after Cabrera found petitioner with Ms. Cumerma in Cabrera's home. The court notes that Ms. Cumerma was identified by petitioner to his counsel prior to trial, but that trial counsel did not attempt to locate this witness. Indeed, in post-conviction proceedings, it was Judge Guy that noted the witness' full name appeared in the record of the preliminary hearing. The Court finds that the testimony of Ms. Cumerma was material and would, in all probability have effected the outcome of the trial because the state's case depended, in large part, upon the testimony of Fernando Cabrera. The court concludes from the transcripts of the hearing that Ms. Cumerma was apparently present in Las Vegas and was registered at the Department of Motor Vehicles prior to and at the time of trial. At the time of Mr. Bailus' representation of petitioner, Ms. Cumerma was not present in Nevada, had married and changed her name. Through the investigative funds available through the federal court, Ms. Cumerma was able to be located and her testimony was, finally, heard. The Court finds that trial counsel's failure to attempt to locate, interview, and present this witness to the jury was objectively unreasonable and that the testimony of this witness would have, in reasonable probability, have effected the outcome of the trial.

10. The Court also finds, based upon the uncontradicted declarations submitted in this case on behalf of petitioner, the admission of which was stipulated to by the state which reserved its rights to object to the testimony only on the basis of waiver, that there were other witnesses reasonably available to trial counsel who would have provided testimony which the jury should have heard. These witnesses include

Roberto Escobedo, who was a friend of the victims who discovered the body. Defense counsel never interviewed this witness, and therefore the jury never learned that Fernando Cabrera knew the victim – a fact Cabrera denied at trial. Roberto Escobedo testified as a prosecution witness at trial. However, because trial counsel made no attempt to interview this witness, he remained unaware that Mr. Escobedo would provide testimony which was valuable to the defense, if asked. Other affidavits and documents submitted in this case by petitioner indicate that evidence was available to trial counsel through a number of reasonably available sources, including police reports, that should have been presented to the jury in this case by defense counsel. The lack of pre-trial investigation and preparation by trial counsel, as is set forth in the petition for writ of habeas corpus and unchallenged by the state, cannot be justified.

11. The petition filed in this case details many additional challenges to the constitutionality of the conviction and sentence. This Court has not considered these issues in light of its determination of the merits of the petition on the issue of ineffective assistance of counsel, which is indisputably present from the record. It does, however, appear from the petition, which has not been opposed by the state on its merits, that there are many additional grounds upon which relief would be warranted. The failure of trial counsel to effectively investigate and prepare this case for trial is so glaring and clear that this Court finds there is no need to proceed beyond the issue of the violation of the Sixth Amendment guarantee of effective assistance of counsel in order to decide the merits of the petition and grant relief.

12. As to the State's motion to dismiss, the court finds that this petitioner was expressly advised by both his former counsel and the state in court on November 25, 1985, that he had nine levels of appeal available to him after the denial of his direct appeal. The Court further finds that Mr. Miranda was never advised by either the Court or his counsel that the

failure to raise all issues in the prior proceedings could result in a waiver of those issues. The Court also finds from the affidavit of Mr. Bailus and the affidavit of Mr. Miranda that Mr. Miranda did not, at any time in these proceedings, make a tactical choice to forgo presenting any of the claims contained in the petition before this Court. Further, NRS 34.820(3) required that, in this death penalty case, the court was required to personally address both Miranda and Mr. Bailus and inform them that all claims which challenged the conviction and the death penalty must have been joined in the petition. This did not occur in the prior proceedings in which Mr. Miranda was represented by Mr. Bailus.

Accordingly, based upon the foregoing findings, and in accordance with NRS 34.830(1) the Courts makes the following conclusions of law.

CONCLUSIONS OF LAW

1. The failure of trial counsel to investigate and present available witness testimony, much of which had been identified to trial counsel by petitioner prior to trial, violated petitioner's rights to due process and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. Petitioner has demonstrated in these proceedings that his trial counsel's performance fell below any reasonable objective standard of constitutionally adequate representation. Based upon this Court's consideration of the evidence that has been adduced by petitioner in these proceedings, the Court concludes that the verdict returned by the jury is unreliable. *Strickland v. Washington*, 466 U.S. 668 (1984); *Sanborn v. State*, 107 Nev. 388, 812 P.2d 1279 (1991).

2. The state has not challenged seriously the facts as set forth in the petition, nor has the state argued that trial counsel was indeed effective. The State did not file a written opposition to the petition, but instead relied solely upon its argument that petitioner's challenges to his conviction had

been waived because they had not been presented by Mr. Bailus in prior proceedings. Based upon the record in this case, including the affidavit of Mr. Bailus, the affidavit of Roberto Miranda, and the transcript of the prior proceedings, this Court concludes that Mr. Miranda did not waive his right to present the arguments contained in his petition. It is clear from the record in this case that at every point in which he was given an opportunity to do so, petitioner attempted to present all evidence which supported his innocence to the Court. The fact that there have been substantial impediments to his ability to present the evidence to support his claim of ineffective assistance of counsel cannot be attributed to the petitioner. Petitioner's claim of ineffective assistance of counsel has merit. The inability of Mr. Bailus to present the evidence since gathered by current counsel is attributable to many factors, including, as noted by Judge Guy on a number of previous occasions, the passage of time that occurred when the case was on direct appeal. In now determining the issue of ineffective assistance of counsel, supported by the additional evidence presented in these proceedings, this court finds that good cause exists to excuse any procedural default that may be suggested by the state. *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994).

ORDER

Based upon the foregoing, it is hereby ORDERED that the petition for writ of habeas corpus be granted, that the writ be issued, and that the petitioner be granted a new trial:

Dated this 13th of February, 1996.

/s/
SENIOR DISTRICT JUDGE